

release (Securities Exchange Act Release No. 35788, May 31, 1995) and by publication in the **Federal Register** (60 FR 30133, June 7, 1995). No comment letters were received. The Commission is approving the proposed rule change.

I. Background

Article III, Section 34 of the Rules of Fair Practice regulates participation by members and persons associated with a member in direct participation programs and limited partnership rollover transactions ("DPP rule"). The DPP rule generally prohibits a member or a person associated with a member from participating in a public distribution of a direct participation program or a limited partnership rollover transaction unless the distribution or transaction conforms to certain suitability and disclosure requirements and standards of fairness and reasonableness.

Since the adoption of the DPP rule in 1982,⁴ an increasing number of direct participation programs, such as master limited partnerships, have issued partnership units, depositary receipts for such units, or assignee units of limited partnership units that are freely tradeable in a manner generally analogous to common stock and are quoted on Nasdaq or listed on registered national stock exchanges.

A direct participation program security is considered freely tradeable under Section 34 if it is either (1) a secondary public offering of or a secondary market transaction in a direct participation program security for which quotations are displayed on Nasdaq or which is listed on a registered national securities exchange, or (2) a primary offering of a direct participation program for which an application for inclusion on Nasdaq or listing on a registered national securities exchange has been approved.

To address the increased transparency and liquidity associated with the nature of the secondary markets for freely tradeable direct participation program securities, the NASD amended the DPP rule to exempt freely tradeable direct participation program securities from the suitability requirements of Subsections 34(b)(3) (A) and (B) of the DPP rule.⁵

⁴ The DPP rule was initially approved by the Commission as Appendix F to Article III, Section 34 on September 16, 1982 (Securities Exchange Act Release No. 19054); 47 FR 42226 (September 24, 1982).

⁵ See Securities Exchange Act Release No. 23619 (September 15, 1986); 51 FR 33968 (September 24, 1986). However, freely tradeable direct participation program securities are still subject to the general suitability rules of the NASD. See NASD's Rules of Fair Practice, Article III, Section 2. Section 2(a) states:

Recently, the NASD considered whether Monthly Income Preferred Securities ("MIPS"), a new financial instrument which is a freely tradeable direct participation program security, ought to be subject to the discretionary account restrictions in Article III, Section 34.⁶ In its consideration, the NASD determined that the concerns which attach to the use of discretionary authority for illiquid, unmarketable direct participation program securities are not present with freely tradeable direct participation program securities.

II. The Terms of Substance of the Proposed Rule Change

The proposed rule change reverses the order of current Subsections (b)(3)(C) and (D) to Section 34 and adds a reference to Subparagraph 3(C) in new Subparagraph 3(D) to exclude freely tradeable direct participation program securities from the prohibition on transactions in discretionary accounts without written approval. However, the exclusion for freely tradeable direct participation program securities in newly designated Subparagraph (3)(D) restricts the exclusion to members that are not affiliated with the direct participation program.

III. Discussion

The Commission believes that the rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ which require that the rules of the Association be designed to prevent fraudulent and manipulative acts and promote just and equitable principles of trade. The rule change relieves members of their obligation to comply with the prohibitions against discretionary transactions in freely tradeable direct participation program securities without written approval because the transactions do not present the substantial conflicts of interest and regulatory concerns that the

[I]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

⁶ MIPS are preferred securities issued by a parent company's subsidiary, which is structured as a limited partnership or limited liability company. The subsidiary issues MIPS to investors and invests the proceeds in convertible subordinated debentures of the parent. Interest on the debentures of the parent are paid to the subsidiary, which in turn pays the equivalent rate of interest to MIPS holders in the form of dividends. MIPS are eligible to be listed on a national securities exchange or The Nasdaq Stock Market and have flow-through tax consequences for investors, which means that they are considered direct participation programs and, therefore, subject to Section 34.

⁷ 15 U.S.C. 780-3.

prohibitions were intended to address. Furthermore, freely tradeable direct participation securities that are included on Nasdaq or listed on a registered national securities exchange provide investors with a liquid and available market for trading surplus securities placed in their discretionary accounts without written approval.

The exclusion for freely tradeable direct participation program securities is limited to members that are not affiliated with the direct participation program. Where such an affiliation is present, the Commission agrees with the NASD that substantial conflict of interest and regulatory concerns continue to exist and the exclusion should not be made available.

The NASD's members' use of discretionary authority for transactions in freely tradeable direct participation program securities is consistent with the NASD's 1986 amendments to Section 34 exempting freely tradeable direct participation program securities from the suitability and disclosure requirements of Section 34. The heightened suitability and disclosure requirements, which are necessary where direct participation program securities lack liquidity and marketability, are unnecessary where a ready, liquid market exists.

In addition, discretionary transactions in freely tradeable direct participation program securities would remain subject to the general discretionary account requirements contained in Article III, Section 15 of the Rules of Fair Practice.⁸

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR-NASD-95-21 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

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⁸ Article III, Section 15(a) of the Rules of Fair Practice provides that "[n]o member shall effect with or for any customer's account in respect to which such member or his agent or employee is vested with any discretionary power any transactions of purchase or sale which are excessive in size or frequency in view of the financial resources and character of the account."

[Release No. 34-35955; File No. SR-NASD-95-23]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Gross Assessments

July 11, 1995.

On May 23, 1995, the National Association of Securities Dealers, Inc. ("NASD" or "association") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder.² The proposed rule change amends Section 1 to Schedule A of the NASD By-Laws to clarify gross income filing requirements to include all revenue and to require all members to report revenue on a calendar year basis.

Notice of the proposed rule change, together with the substance of the proposal, was issued by Commission release (Securities Exchange Act Release No. 35795, June 1, 1995).³ No comment letters were received. The Commission is approving the proposed rule change.

I. Background

Recently, the NASD amended Section 5 of Schedule A to the By-Laws to define gross revenue for assessment purposes as income reported on the FOCUS report, with certain limited exclusions and deductions.⁴ The FOCUS report reports income on a calendar year basis. However, Section 1(a) of Schedule A was not amended when this change was enacted and still gives members the election to report on either a calendar year or fiscal year basis.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The proposal was originally filed with the Commission on May 15, 1995. The NASD subsequently submitted Amendment No. 1 to the filing which amends the proposed rule to publish under Section 19(b)(2) of the Act that portion of the proposed rule change that amends Section 1 to Schedule A to the NASD By-Laws and to publish under Section 19(b)(3)(A)(ii) of the Act that portion of the proposed rule change that amends Section 2 to Schedule A of the NASD By-Laws. Letter from Suzanne E. Rothwell, Associate General Counsel, NASD, to Mark P. Barracca, Branch Chief, Over-the-Counter Regulation, Division of Market Regulation, SEC, dated May 22, 1995. The NASD designated the part of this proposal for continuing education fees as one establishing or changing a fee under § 19(b)(3)(A)(ii) of the Act, which rendered the rule effective upon the Commission's receipt of this filing.

⁴ See Securities Exchange Act Release No. 35074 (December 9, 1994); 59 FR 64827 (December 15, 1994).

II. The Terms of Substance of the Proposed Rule Change

The NASD is amending Section 1(a) of Schedule A of the By-Laws to require all member firms to report annual gross revenue for assessment purposes on a calendar year basis. Each member is to report annual gross revenue as defined in section 5 of Schedule A, for the preceding calendar year.

III. Discussion

The Commission believes that the rule change is consistent with the provisions of Section 15(A)(b)(5) of the Act⁵ which require that the rules of the Association provide for the equitable allocation of reasonable dues, fees, and other charges. The rule change provides a consistent basis for assessments among member firms by requiring all firms to report annual gross revenue on a calendar year basis. In addition, the rule change rectifies the current inconsistency between Sections 1 and 5 of Schedule A of the By-Laws.

The Commission finds that the amendment will simplify the data collection and reporting process for the NASD.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR-NASD-95-23 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

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[Rel. No. IC-21202; File No. 812-9482]

Ameritas Life Insurance Corp., et al.

July 11, 1995.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "1940 Act").

APPLICANTS: Ameritas Life Insurance Corp. ("Ameritas"), Ameritas Life Insurance Corp. Separate Account LVL ("Separate Account"), and Ameritas Investment Corp. ("Investment Corp.").

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) for exemptions from Section 27(c)(2) of the 1940 Act and Rule 6e-3(T)(c)(4)(v) thereunder.

SUMMARY OF APPLICATION: The Applicants seek an order to permit them to deduct from premium payments

⁵ 15 U.S.C. 78o-3.

received under certain flexible premium variable life insurance contracts (the "Policies") issued through the Separate Account an amount that is reasonable in relation to Ameritas's increased federal tax burden resulting from the application of Section 848 of the Internal Revenue Code of 1986, as amended (the "Code"). The deduction would not be treated as sales load.

FILING DATE: The application was filed on February 15, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 7, 1995, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549; Applicants, c/o Norman M. Krivosha, Esq., Ameritas Life Insurance Corp., 5900 "O" Street, Lincoln, Nebraska 68510.

FOR FURTHER INFORMATION CONTACT: Edward P. Macdonald, Staff Attorney, or Patrice M. Pitts, Special Counsel, Division of Investment Management (Office of Insurance Products), at (202) 942-0670.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the SEC.

Applicants' Representations

1. Ameritas, a mutual life insurance company domiciled in Nebraska since 1887, is licensed to sell insurance in 49 states, and has assets of over \$2 billion.

2. In 1994, the Board of Directors of Ameritas established the Separate Account under Nebraska law. The Separate Account is registered as a unit investment trust under the 1940 Act.

3. Currently, there are eleven subaccounts within the Separate Account available to policyowners for investment. Each subaccount will invest only in the shares of a corresponding portfolio of the Vanguard Variable Insurance Fund or Neuberger & Berman Advisers Management Trust (collectively the "Funds"). Each Fund is